



July 12, 1999

Ms. M. Bernadette McKay  
Assistant City Attorney  
Office of the City Attorney  
P.O. Box 639966  
San Antonio, Texas 78283-3966

OR99-1931

Dear Ms. McKay:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 125557.

The City of San Antonio (the "city") received two requests for the proposals it received in to provide billing and collection services for emergency medical service fees. One request also seeks "the data and graphs submitted to the city council." You do not claim an exception for the documents submitted to the city council, and we assume that you have released this information. Pursuant to section 552.305(a) of the Government Code, a governmental body may decline to release information for the purpose of requesting an attorney general's decision when a person's property interests may be involved. The city raises no exceptions to disclosure on its own behalf, but asks that we consider the arguments of the companies whose proposals are at issue. The city has submitted the information at issue to this office for review.

Since the property and privacy rights of third parties may be implicated by the release of the submitted information, this office notified Business and Professional Services, Southwest General Services, Inc., Texas Medical Data Systems, and Alexander Consulting, Inc. about the request for information. See Gov't Code § 552.305 (permitting interested third party to submit to the attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Public Information Act in certain circumstances). This office received responses from Alexander Consulting, Inc. ("ACI") and Business and Professional Services ("BPS").

Because Southwest General Services, Inc. and Texas Medical Data Systems did not respond to our notice, we have no basis to conclude that these companies' proposals are excepted from disclosure. See Open Records Decision Nos. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). The proposals of Southwest General Services, Inc. and Texas Medical Data Systems must, therefore, be released to the requestors.

Both ACI and BPS argue that section 552.104 of the Government Code excepts their proposals from disclosure. Section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). Because the city does not raise section 552.104, this section is not applicable to the information at issue. *Id.* (governmental body may waive Gov't Code § 552.104).

ACI and BPS also contend that section 552.110 excepts their proposals from disclosure. Section 552.110 protects the property interests of third parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.<sup>1</sup> In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. Thus, this office relied on *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), as a judicial decision and applied the standard set out in *National Parks* to determine whether information is excepted from public disclosure under the commercial and financial prong of section 552.110. However, the Third Court of Appeals recently held that *National Parks* is not a judicial decision within the meaning of section 552.110. *Birnbaum v. Alliance of Am. Insurers*, 1999 WL 314976 (Tex. App.—Austin May 20, 1999, no pet. h.). Because ACI and BPS have not cited to a statute or judicial decision that makes commercial or financial information privileged or confidential, their bid proposals are not excepted from disclosure under the commercial or financial information prong of section 552.110.

Both ACI and BPS contend that portions of their proposals are trade secrets. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958);

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<sup>1</sup>We note that Senate Bill 1851 amends section 552.110 to protect commercial or financial information only if "it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." This amendment takes effect September 1, 1999. S.B. 1851, § 7, 76<sup>th</sup> Leg., R.S. (1999). Trade secrets obtained from a person continue to be protected from disclosure.

*see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>2</sup> This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

Having considered ACI's arguments, we find that ACI has established, by a *prima facie* case, that the following portions of its proposal should be withheld from disclosure under the

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<sup>2</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

trade secret prong of section 552.110: the sections titled Documentation of Billing Contracts, A/R System Design and Implementation, and Obtaining Accurate Information from Hospitals and Other Health Care Providers. The city must withhold these sections of ACI's proposal from disclosure (see blue tabs).

Having considered BPS's arguments, we find that BPS has established, by a *prima facie* case, that the following portions of its proposal should be withheld from disclosure under the trade secret prong of section 552.110: the sections titled Appendix C - System Security, Appendix E - Programming Modifications, Functional Requirements of Contractor's Approach, Summary of the EMS Billing and Collection Process by BPS, Detailed Work Plan and Collection Procedures, Proposer's Plans, Collections Contract Controls and Standards, Details of BPS Billing and Collections Software, Collector's System, Software, Methods, and Personnel, and the marked portions of the section titled Detail of Computer Facilities and Staff. The city must withhold these sections of BPS's proposal from disclosure (see blue tabs). With the exception of the information we have marked as protected under section 552.110, the city must release the submitted information to the requestors.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Karen E. Hattaway  
Assistant Attorney General  
Open Records Division

KEH/ch

Ref: ID# 125557

Encl: Marked documents

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